PHELPS DODGE CORP.

IBLA 81-1067 Decided September 8, 1983

Appeal from decision of the New Mexico State Director, Bureau of Land Management, rejecting protests of wilderness inventory designations. NM 020-044, et al.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Wilderness -- Wilderness Act

   BLM does not violate the terms of sec. 603(a), Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782 (1976), directing the Secretary to review those roadless areas of 5,000 acres or more of the public lands, identified during the inventory required by sec. 201(a) as having wilderness characteristics, where BLM undertakes a review of the public lands for wilderness characteristics prior to a multi-resource inventory of the public lands.

2. Federal Land Policy and Management Act of 1976: Wilderness -- Wilderness Act

   BLM's practice of designating lands occupied by roads or other intrusions as nonwilderness corridors (cherrystems), thereby excluding such lands from wilderness review and permitting adjacent lands, otherwise possessing wilderness characteristics, to be studied for their uses, values, and resources, is not an unlawful practice or contrary to any established Department policy.

3. Federal Land Policy and Management Act of 1976: Wilderness -- Wilderness Act -- Words and Phrases

   "Roadless." H.R. Rep. No. 94-1163, 94th Cong., 2d Sess. 17 (1976), provides

a definition of "roadless" adopted by the Bureau of Land Management in its Wilderness Inventory Handbook. The word "roadless" refers to the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continous use. A way maintained solely by the passage of vehicles does not constitute a road.

4. Federal Land Policy and Management Act of 1976: Wilderness -- Wilderness Act

Where the record evidences BLM's first-hand knowledge of lands within an inventory unit and contains comments from the public as to the area's fitness for wilderness preservation, BLM's subjective judgments of the area's naturalness qualities are entitled to considerable deference.

APPEARANCES: Jerry L. Haggard, Esq., David P. Kimball III, Esq., Phoenix, Arizona, for appellant; Dale D. Goble, Esq., Office of the Solicitor, Department of the Interior, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Phelps Dodge Corporation has appealed from a decision dated February 4, 1981, by the Acting State Director, New Mexico, Bureau of Land Management (BLM), denying its protest on wilderness inventory units. The units in issue were designated as Wilderness Study Areas (WSA's) by the State Director on November 14, 1980, and published in the Federal Register, 45 FR 75590 (Nov. 14, 1980). Twelve units are on appeal herein. 1/

1/ These units are: NM-020-044 NM-030-007 NM-030-023 NM-030-026 NM-030-031 NM-030-035 NM-030-038 NM-030-042 NM-030-052 NM-030-053 NM-030-063 NM-030-065 (Las Uvas Mountain). This unit is the subject of another appeal before the Board, IBLA 81-1066 (Wilford Cothern) wherein the issue was whether a route within the unit was a "way" or a "road." The appellant therein had made a sufficient showing to cast doubt on BLM's designation of the route as a way. We, therefore, remanded the case for further consideration. Therefore, WSA NM-030-065 is not before the Board in the instant case.

Section 603(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782(a) (1976), provides for Secretarial review of "roadless areas of five thousand acres or more and roadless islands of the public lands, identified during the inventory required by 1711(a) * * * as having wilderness characteristics described in the Wilderness Act of September 3, 1964" and for recommendations to the President "as to the suitability or nonsuitability of each such area or island for preservation as wilderness." The wilderness review of the public lands pursuant to FLPMA has been divided into three phases by BLM: Inventory, study, and reporting. (See BLM "Wilderness Inventory Handbook" (WIH) dated September 27, 1978, at 3.) The first phase is further divided into an initial and an intensive inventory stage. The initial inventory consists of the identification and evaluation of inventory units and a final decision regarding each unit, determining whether it clearly and obviously does not meet the criteria as a WSA or whether it may possibly meet such criteria. Those units which may possibly meet such criteria are subjected to an intensive inventory and a final decision is then made on which units to designate as WSA's.

BLM considered the characteristics of the lands in question to determine if they met the wilderness criteria as set forth in section 2 of the Wilderness Act of 1964, 16 U.S.C. § 1131(c) (1976), which defines wilderness and lists wilderness characteristics as follows:

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

BLM evaluated the units in question according to these guidelines and determined that they were suitable for designation as WSA's.

[1] Appellant's first argument is that BLM conducted a "wilderness-only" inventory and neglected to evaluate the other resources of these lands in violation of section 201(a). That section directs the Secretary to "prepare and maintain on a continuous basis an inventory of all public lands and their resource and other values." 43 U.S.C. § 1711 (1976). Appellants interpret section 201(a) to require a multi-resource inventory prior to any wilderness review of the same lands. The result of BLM's "wilderness-only" inventory in appellant's view, has been to designate lands as WSA's in ignorance of the resources therein and to lock up these lands for an unlimited period of time under BLM's Interim Management Policy.

This argument was advanced by the Cotter Corporation in Utah v. Andrus, 486 F. Supp. 995 (D. Utah 1979). Therein, Judge Anderson addressed its merits:

> Cotter contends that BLM must take all potential values into account when it designates an area as a WSA. The statute, however, envisions a dynamic process, not a static one-time-only decision. FLPMA is addressed in part to solving the problem of the lack of a comprehensive plan for the use, preservation and disposal of public lands. The purpose of the inventory and the wilderness review is to enable BLM to ascertain the character of the lands within its jurisdiction, and the best use to which particular portions of land can be put -- given such things as wilderness characteristics, mineral values, and the nation's needs for recreation, energy, etc. BLM is entitled to address this problem one step at a time. [Citations omitted; emphasis in original.]
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> * * * BLM is not required to immediately balance the mineral values against the wilderness values of a particular piece of land prior to designating the land a WSA. BLM may, consistent with FLPMA, look first at potential wilderness characteristics and then proceed to study the area for all its potential uses prior to formulating its final recommendations to the Executive. [Emphasis added.]

Id. at 1003.

In Asarco, Inc., 64 IBLA 50 (1982); and Petroleum, Inc., 61 IBLA 139 (1982), this Board reached results consistent with that of Judge Anderson. In those cases we noted that the concern of the appellants that the Secretary have comprehensive and balanced information regarding the various values of the WSA be met during the study phase of the review process. During this phase, BLM will consider all values, resources, and uses of the land considered for wilderness preservation. This same statement is equally appropriate in the instant appeal. No argument presented by appellant in the statement of reasons compels a different result.

Appellant also argues that the criteria of the WIH, and the management restrictions set forth in the Department's interim management policy do not comply with section 603, congressional intent, or national policy. While appellant's argument may be of interest in the future, it alleges no facts which would evidence an ongoing controversy and thus allow the Board to consider this argument in a concrete, factual setting. Moreover, the right to protest the State Director's WSA's designations was granted to provide a forum for those persons objecting to BLM's finding that the WSA's possessed the requisite size, naturalness, and outstanding opportunities. Appellant's arguments are outside the scope of this grant and must await a future adverse application of the IMP to a proposed action of appellant. Asarco, Inc., supra at 60.

[2] Appellant contends that BLM has designated at least six WSA's that are not roadless. The focus of this argument is BLM's cherrystemming practice whereby BLM designates as nonwilderness corridors (cherrystems) lands occupied by roads or other intrusions that would seemingly disqualify a parcel from wilderness consideration. The boundaries of an inventory unit

containing a cherrystem are drawn around an intrusion by BLM so as to exclude it from the area being considered for wilderness values.

In National Outdoor Coalition, 59 IBLA 291, 296 (1981), we held that BLM did not act contrary to law or any established Department policy in recognizing nonwilderness corridors occupied by roads or other manmade intrusions. Though the boundaries of a WSA "containing" a nonwilderness corridor might be irregular as a result of such corridors, we agreed with BLM that section 603(a) did not specify any particular shape for an area that may eventually be recommended for wilderness preservation. This decision has been followed in several subsequent cases, none of which are materially different from the cases on appeal. See, e.g., State of Nevada, 62 IBLA 153 (1982), and C & K Petroleum Co., 59 IBLA 301 (1981). The State Director's response approving the practice of cherrystemming is, accordingly, affirmed.

[3] Appellant expresses considerable opposition to BLM's characterization of certain vehicle routes within the WSA's as ways rather than roads. The opposition raised by appellant calls for a close examination of the definition of a "road" used by BLM in its field work. That definition, set forth in H.R. Rep. No. 1163, 94th Cong., 2d Sess. 17 (1976), also appears in BLM's WIH at 5: "The word 'roadless' refers to the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road."

Appellant relies upon Organic Act Directive (OAD) 78-61, Change 2 (June 28, 1979), for the proposition that a route qualifies as a "road" so long as the route was improved at one time with tools to insure relatively regular and continuous use. Such an interpretation, we feel, is misleading. OAD 78-61 does nothing to remove the requirement that a vehicle route, once improved by mechanical means, must receive maintenance by mechanical means as needed in order to qualify as a road. What the OAD does say, however, is that a route, having been mechanically improved, may be regarded as a road if mechanical maintenance has not yet been necessary. Improvements and relatively regular and continuous use would be an indication that the road would be maintained if the need were to arise. OAD at 4. Appellant does not establish error in BLM's methods by pointing to WSA's where evidence of the use of tools is found. Similarly, appellant does not establish error by alleging mechanical improvement and mechanical maintenance in the past if mechanical maintenance has not been made for some time. The contention that a route is in fact a road must be supported by proof of mechanical improvement and mechanical maintenance, inter alia. See Conoco, Inc., 61 IBLA 23, 30 (1981). If mechanical maintenance is unnecessary because of the stability of the soil or other reasons, that fact must be alleged and proved. No such allegation appears in appellant's statements of reasons. See Sierra Club, 62 IBLA 367, 369-70 (1982).

The "road" definition that BLM uses in its field work applies also to routes of travel within a wash. Appellant's argument that a route located within a wash subject to annual runoffs should be presumed to be improved finds no support in FLPMA, the WIH, or the OAD's. The further contention that BLM's requirement of mechanical maintenance is artificial or irrelevant because nonmechanically maintained routes may be equally visible or well-traveled overlooks the fact that BLM may eliminate such routes as substantially noticeable imprints of man.

[4] Finally, appellant argues that certain WSA's contain significant intrusions of man and otherwise lack wilderness characteristics. Appellant does not point to specific intrusions or inholdings which, it contends, the protest response overlooked or improperly considered. In the absence of specific allegations of error our review is limited to the issues of law or policy advanced by appellant. The review of these issues was previously made in Asarco, Inc., supra at 56-57, and we invite attention to our discussion in that decision. The record evidences BLM's firsthand knowledge of the units in question and contains comments from the public as to the areas' fitness for wilderness preservation. In these circumstances BLM's subjective judgments of wilderness characteristics are entitled to considerable deference. Conoco, Inc., 61 IBLA 23 (1981).

We observe again that appellant has not challenged BLM's specific factual findings as to individual WSA's. Rather, the thrust of its appeal has been to take issue with BLM's wilderness inventory procedures, and with statutory and Departmental guidelines for accomplishing the inventory. Our disposition of the appeal is dispositive of the legal and policy issues raised.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Gail M. Frazier
Administrative Judge

We concur:

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Douglas E. Henriques
Administrative Judge

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James L. Burski
Administrative Judge